UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

ARBAH HOTEL CORP. D/B/A
MEADOWLANDS VIEW HOTEL

and **Case Nos. 22-CA-197658, et al.**

NEW YORK HOTEL AND MOTEL
TRADES COUNCIL, AFL-CIO

RESPONDENT'S POST-HEARING BRIEF TO ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO

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I. STATEMENT OF THE CASE

Respondent Arbah Hotel Corp. d/b/a Meadowlands View Hotel ("Respondent" or "Charged Party" or the "Hotel" or the "Employer") is the owning entity of high-rise hotel located in North Bergen, NJ that is perfectly situated off Interstate Rt 495, just minutes away from Midtown Manhattan. Due to nature of Respondent's business it is critical that the Hotel's employees preserve their work related duties specific to the department they operate in as their fulfillment of said duties are essential to the Hotel's operation and primary source of revenue, *to wit*, renting rooms to patrons and providing them a quality stay, that is close to Midtown Manhattan, at a fair and competitive rate to ensure they will return on their next trip to the City and/or write a positive review on any one of the many customer review websites that are now common place in today's social media age.

As the area around the Hotel becomes more and more gentrified additional Hotels that were not there five years ago are now competing with the Hotel for booking, thereby necessitating that the Hotel provide an elevated level of care to that of its competitors, pertaining, but not limited to, the quality of guest rooms available when compared to the neighboring competitors. Approximately thirty (30) of the Respondents employees are members of the New York Hotel And Motel Trades Council, AFL-CIO (the "Union" or "Charging Party").

On or about April 24, 2018, the General Counsel of Region 22 of the National Labor Relations Board ("NLRB"), Amended & Consolidated the Complaint, specific to charges 22-CA-1976582, 22-CA-203130, 22-CA-205317, 22-CA-205422, 22-CA-209158 and 22-CA-212705 that were filed by the Union against the Respondent for various allegations claiming unfair labor charges in violation of Section 8(a)(1), (3), & (5) of the National Labor Relations Action ("NLRA").

II. ALLEGATIONS & ISSUES PRESENTED

Specifically, the Union alleged without any significant detail or specificity as set forth in the Amended & Consolidated Complaint that the Respondent violated:

A) Sec. 8(a)(1) & (3) of the Act when Respondent terminated its employee Marie Dufort ("Dufort"), citing the basis for such termination to be Dufort's dishonesty in the form of the cover-up she engaged in to mask her insubordination and repeated lies to multiple supervisors about fulfilling her job related duties as so required pursuant to the Collective Bargaining Agreement that expired in July 2015, but with certain provisions still surviving and in force;

B) Sec. 8(a)(5) where the Respondent notified the Union that it elected, pursuant to its rights under the CBA, to "grieve" any complaints that an employee(s) had made with respect to an allegation of being entitled to over-time pay as opposed to producing voluminous amounts of punch and payroll records, the details of which were sensitive and confidential;

C) Sec. 8(a)(1) when the Respondent disseminated a letter dated September 8, 2017 that is alleged by the Union to have threatened the employees, despite the letter merely conveying the scenario that should the employees not enroll in the insurance that the Respondent located that was equal to and, actually better than the current plan administered by the Union's designated provider (UHH), they may no longer be with health insurance because the aforesaid current provider had notified the Employer they were intending to cancel coverage;

D) Sec. 8(a)(1) when the Respondent, by way of the aforesaid September 2017 letter engaged in direct dealing with the employees that undermined the Union as the exclusive designated bargaining agent thereof, despite the fact that all matters set forth in the aforesaid letter were discussed with the union and the basis for previous negotiations therewith prior to being included in the aforesaid letter, which, by its sole purpose, was purely informational to

update the employees as to the offers extended for wage increase and impasses that were occurring during the recent bargaining sessions with the Union that took place in August of 2017;

E) Sec. 8(a)(5) where Respondent denied Union representative George Padilla to remain in the Hotel on August 23, 2017, doing so as authorized pursuant to the terms of a duly bargained for Settlement Agreement entered into in January of 2017 between the Respondent and the Union;

F) Sec. 8(a)(5) where Respondent is alleged to have failed to maintain health insurance as set forth in the CBA, despite that Union orchestrated a campaign to dissuade the employees from signing up for the aforesaid insurance coverage the Hotel located, negotiated, and was ready, willing, and able to provide as of September 1, 2018 in accordance with its unilateral right to do so as codified in Sec. 3 of the February 12, 2012 Side Agreement to the CBA that was a condition precedent thereto, with such insurance being that which would have been at a savings not only to the Respondent, but to the employees as well, yet provided equal if not better coverage than the UHH plan; and

G) Sec 8(a)(5) where Respondent, from approximately October of 2017, failed to meet and bargain with the Union, despite having had resumed negotiations in March of 2018.

It is the Respondent's position that no such violations of the Act have occurred, the reasons for which shall be set forth in further detail with evidentiary and legal authority in support thereof. As such the Respondent respectfully refers Administrative Law Judge Esposito to the following section in the instant brief that presents the pertinent facts and analysis thereof for an in depth recitation of the facts relevant to each of the allegations as set forth previously above, which Respondent intends to use to establish, along with the analysis thereof and legal

argument pertaining, why the General Counsel is unable to establish its relevant burden of proof pertaining thereto for a finding by the preponderance of evidence that Respondent committed any of the aforementioned violations of the Act.

III. PRESENTATION OF THE PERTINENT FACTS WITH ANALYSIS & LEGAL ARGUMENTS IN SUPPORT THEREOF

A. The Respondent Did NOT Violate The Act When Terminating Marie Dufort Because The Activity For Which She Engaged In When She Was Terminated Was Not "Concerted Activity" and therefore Not Protected by The Act and Where, Even If The Motivation of The Respondent For Terminating Dufort Could Be Deemed To Have Been Motivated By and In Retaliation For Marie's Participation In the Union The Respondent Would Have Terminated Dufort Independent of The Protected Activity That She "Vaguely "Alleges Was The Motivation For Her Termination.

Legal Authority

1. <u>Protected and Concerted Activities</u>.

Section 8(a)(1) of the National Labor Relations Act (the "Act") provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Similarly, Section 8(a)(3) of the Act prohibits employer's "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. §158(a)(3).

The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009). Section 7 of the Act protects an employee's right to "engage in ... concerted activities for the purpose of mutual aid or

protection." 29 U.S.C. § 157. In order to fall within the protection of Section 7 of the Act, "the activities in question **must be 'concerted' before they can be 'protected'**" (emphasis added). *Meyers Indus., Inc*., 268 N.L.R.B. 493,494 (1984) ("Meyers I"). "In general, to find an employee's activity to be "concerted", it must be engaged in with or on the authority of other employees, and **not solely by an on behalf of the employee himself**." *Meyers Indus. Inc*., at 497. An employee who is acting only on his or her own behalf on a personal concern is generally not engaged in protected concerted activity. *Id*. at 493, *MCPc Inc. v. National Labor Relations Board*, 813 F.3d 475, 486 (3rd Cir. 2016) (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir.1964) holding *that its was not concerted activity where the employee was engaged in "mere griping" and not concerted activity when he privately dispensed advice to employees "without involving fellow workers or union representation to protect or improve his own status or working position*")). "The relevant precedent from the 3rd Circuit and the Board reflects that the benchmark for determining whether an employee's conduct falls within the broad scope of concerted activity is the intent to induce or effect group action in furtherance of group interests." *MCPc Inc*. 813 F.3d 475, 486 (3rd Cir. 2016).

The General Counsel must show both that (1) the activity is concerted; and (2) the activity is protected, in order to fall within the protection of the Act. *Meyers Indus., Inc*., 268 N.L.R.B. 493,494 (1984). However, "[t]here can…be **no violation** of § 8(a)(1) by the employer **if there is no underlying § 7 conduct by the employee**. Conduct must be both concerted and protected to fall within § 7 of the Act. *Smithfield Packing Co., Inc. v. N.L.R.B.,* 510 F.3d 507, 516 (4th Cir. 2007), *citing Yesterday's Children, Inc. v. N.L.R.B*., 115 F.3d 36, 44 (1st Cir. 1997).

The GC "carries the burden of proving the elements of an unfair labor practice." *NLRB v. Transp. Mgmt. Corp*., 462 U.S. 393, 401 (1983).

a. Dufort's Conduct For Which She Was Terminated Was Not Concerted

Analysis of Pertinent Facts & Argument Pertaining Thereto

Dufort was terminated for breaching the "dishonesty clause" set forth in the CBA. (GC Exs. 19, 20; R. Ex. 2). Pursuant to the Article XI of the CBA, the "Employer may summarily discharge any employee for dishonesty, insobriety, insubordination…and for any other just cause". (R. Ex. 2, p. 6; GC Ex. 3)[1]. Respondent determined that Dufort had engaged in such "dishonestly" in breach of Article XI of the CBA when Respondent learned that she "entered room 426 on March 16, 2017 on more than one occasion…in order to manipulate findings of [her] improper cleaning duties during the previous day", that being March 15th. (GC Ex. 20 – April 4th Dismissal Notice). Specifically, and as discovered during the investigation conducted by the Respondent over the course of approximately three (3) days, the Respondent uncovered that Dufort, after cleaning "room 426 on Wednesday, March [15], 2017" was "instructed by her supervisor [Jessica Tunia] to remove a dirty quilt and replace it with a clean quilt" after the aforesaid supervisor, "upon an inspection, found a dirty stain on the quilt in plain sight" subsequent to Dufort having "informed [the] supervisor that [she] had completed [her] duties in room 426" earlier that day.[2] Further, and "upon a second inspection conducted on the afternoon of March 15th it was found that the quilt had not been changed [despite] [Dufort] clearly being instructed to do so by [her] supervisor prior to the end of [her] shift" on that day. (GC Ex. 19, pg. 3 – Discipline Notice with Date of Incident: 0/3/15/2017). However, **what was** and **remains the**

[1] The Employer respectfully wishes to remind the ALJ that it was necessary for the
[2] Although the GC Ex. 19 (Discipline Notice) references in the heading thereof that the "DATE OF INCIDENT: 03/15/2017", but cites it as "Wednesday, March 16, 2017" in the body of the notice it is respectively requested that the ALJ take judicial notice that the aforesaid date cited in the body of the notice was nothing more than a typo as March 15, 2017 was on a Wednesday and that March 16, 2017 was on a Thursday.

basis for Dufort's termination was the **cover up and lying that Dufort engaged in** on the following day **to conceal her insubordination** from the day before when she failed and/or refused to change the quilt as so directed by her supervisor.

Specifically, the following morning "[Dufort] entered room 426 at approximately 8:30a.m. with [said room] not included in [Dufort's] daily room list for the [aforesaid date]…thereby making it an unauthorized entry". (GC Ex. 19 – Discipline Notice – Date of Incident: 03/16/2017). To further advance her cover-up Dufort then "flipped" the comforter around to conceal the stain so that it was no longer facing upwards at the bottom of the bed and, thereafter "entered room 426 with Shop Steward, Mercedes Suarez, at approximately 11:00a.m." to demonstrate that she had complied with the supervisor's request to change the comforter the day before. *Id.* (Hr'g Tr. vol 1, 161:15-162:3, 196:2-19, May 30, 2018). "Ms. Suarez [then] informed the supervisors on duty that the quilt in room 426 was in perfect condition" and not as the supervisor (Jessica Tunia) had reported to management the day before on March 15th. *Id.* However, "[u]pon further investigation it was [discovered] that the quilt was turned over (flipped) to hide the dirty stain which had been found from the previous day". *Id.* During further inquiry by management in the presence of the Shop Steward (Mercedes Suarez) "[Dufort], admitted that [she] manipulated the situation by turning over the quilt when [she] entered the room around 8:30a.m." on March 16th to "hide the dirty stain which had been found from the previous day"[3]. *Id.*

[3] In light of the various testimony offered by witness called for examination during the hearing to describe the "quilt" in question as well as the documentary evidence pertaining thereto the Respondent use of any reference to "quilt", "bedspread", "sheet", etc. used by the witnesses' testimony cited in this brief and/or used by the respondent is one in the same with the actual "bedspread" at issue with Dufort's actions.

The aforesaid conduct of Dufort cannot even remotely be considered that which is "concerted" within the meaning of Sec. 7 of the Act because Dufort's conduct and admissions to management with regards to engaging in the aforesaid cover-up of her insubordination on March 15th **was solely** for **her own benefit**, **not** in **furtherance of any such protected activity**, and/or **not on behalf of other union members** as so previously presented herein and further explained in the forgoing analysis. Further, the **record is devoid** of **any testimony** that was **provided by Dufort** or her **union shop steward, Mercedes**, that would indicate that her aforesaid dishonest conduct might be considered to be "concerted activity" where her conduct was intended to induce or effect group action in furtherance of group interests. MCPC Inc. v. National Labor Relations Board, at 486 (3rd Cir. 2016). However, what the record is not devoid of is the **conflicting testimony** offered by Dufort and Mercedes with respect to the actual actions that Dufort engaged in, the details of which only serve to provide further evidence that Dufort will continue to lie as she had before to cover up her aforesaid insubordination.

Specifically Dufort testified that on March 15th;

> "Jessica…asked me to change the bedspread, I call one of the male employee responsible to deliver the linen [a]nd after I changed the bedspread for a new one, Jessica asked me, did you change the bed spread or **did you flip it**?…[and] I said, yes I changed it. And [sic] on the 16th she came to the same question asking me **did you flip or did you change** it?...[and] **I said yes, I changed it.**" (Hr'g Tr. vol 3, 304:18-305:2, 305: 8-10, June 20, 2018).

Even more astonishing is that Dufort adamantly, time and time again, testified in furtherance of her defense that she complied with the supervisor's direction on March 15th and that "**every other employee flip** [sic] bedspread. **I don't flip** bedspread**. I always change** the bedspread". (Hr'g Tr. vol 3, 306: 5-8, 307:6-8, June 20, 2018). Unfortunately for Dufort, Mercedes's testimony the prior day that was offered in support of Dufort conveyed that Dufort **did "flip"** the bedspread to hide the stain, doing so on the morning after March 15th. Specifically, Mercedes's

testimony directly contradicts that of Dufort's adamant position that "she [unlike everyone else] does not flip" the bedspreads where Mercedes testified that;

> "From the first moment that I entered the room and Marie took me and the stain was not there, **Marie had turned over the sheets, the blanket**. The first thing in the morning, the first thing she did was go to the room because maybe the night before she didn't get a chance to do it…and she didn't have to tell me that [she just turned over the stained bedspread to hid the stain] because that was the standard practice. " (Hr'g Tr. vol 1, 197:14-1520, 203:5-6, May 30, 2018).

Further, Dufort's former Union representative, Ms. Sayde Stern, subsequent to speaking with Dufort to prepare for a grievance meeting with the Respondent over Dufort's termination **confirmed that Dufort did flip the bedspread** and acted in accordance with the completely preposterous standard practice of the hotel, which was alleged by the Charging Party to be that all house keepers were to "flip" stained bedspreads, testifying that she conveyed to the Respondent that;

> "We explained that we understood **that the practice of the Hotel** was that if there was a stained comforter, that comforter would be flipped over. And that, that was **-- Marie was acting in accordance with past practice** regarding that issue, but that she had been treated differently than other employees. None of which had ever been disciplined before for, for doing that." (Hr'g Tr. vol 1, 57:13-20, May 30, 2018).

Such conflicting supporting testimony offered by the witnesses in support of Dufort's defense can only lead to one of two more than a year after her termination to cover up her willful insubordination that occurred on March 15th when Jessica found the very same stain on the bedspread that she had directed Dufort to change earlier in the day. Further, If Marie had "flipped" the comforter as Mercedes and Sayde testified that she had done so on March 15th, how could the very same stain be located in the very same area on the quilt, especially if it was a different one as Dufort so claims it to be? The answer is that it simply could not be.

The Charging Party, when offering testimony in support of Dufort's allegations cannot have it both ways. Either Dufort flipped the comforter around to hide the stain as it is so alleged by the Charging Party to have been the practice within the housekeeping department of the hotel or she changed the bedspread as she so testified each time Jessica, her supervisor, directed. However, if it were the former, Dufort's action of flipping the bedspread to cover up the stain after so directed by Jessica to change the bedspread, even if in line with the alleged accepted aforesaid practice, **still remained in direct violation of the directions of her supervisor**, thereby still making her insubordinate and in violation of Article XI of the CBA. Further, if Dufort had, as she so alleged and testified to, changed the bedspread each time Jessica directed her to do so her testimony is devoid of any explanation as to how the exact same stain was in the same location on the bedspread, other than that "they are all stained" and confirmed by Mercedes to have been present on March 16th after the Respondent conducted its investigation and, after re-flipping the bed spread, found the stain in the exact same area as it was the day before. (Hr'g. vol 3, 336:1-337:17 June 20, 2018).)

In MCPC Inc. the 3rd Circuit found that the employee's conduct, *to wit*, his "complaint to [a manager] that he was working many hours a week, urg[ing] [the manager] to hire additional engineers to alleviate the unduly heavy workloads", at first glance appeared to be not concerted activity because it "…was to improve his working position without the imprimatur of other employees". *Id* at 480 & 483. However, the 3rd Circuit further reasoned that the employee's aforesaid complaints to management did constitute "concerted activity" within the Act because the complaint by the employee "arguably also was to induce group action in the interest of those employees" where the comments were made at a "team building lunch" and "two other

employees expressed their agreement when the employee urged MCPC to hire more engineers" *Id* at 483 & 485.

Conversely and completely dissimilar to the facts in MCPC Inc. and the conduct of the employee therein, Dufort's aforesaid conduct (dishonesty and insubordination) cannot be that which is "concerted activity" because her actions "were [NOT] to induce group action in the interest of [other] employees" like that of the employee in MCPC Inc. where Dufort's complaints were not about working conditions, but rather as a lie to her shop steward (Mercedes) to cover up the fact that she had not changed the bedspread as directed to do so the day before by her supervisor. (GC Ex. 19 – Discipline Notice – Date of Incident: 03/16/2017) (Hr'g Tr. vol 1, 161:15-162:3, 196:2-19, May 30, 2018). Unlike the employee in MCPC Inc., Dufort's actions only could be reasonably believed by her to benefit herself because the cover-up and lying she engaged in was for the sole purpose of concealing her aforesaid insubordination. *Meyers Indus. Inc.*, at 497; *MCPC Inc*. at 486 (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir.1964) holding *that its was not concerted activity where the employee was engaged in "mere griping" and not concerted activity when he privately dispensed advice to employees "without involving fellow workers or union representation to protect or improve his own status or working position*")).

Frankly, to suggest that such conduct (dishonesty and orchestrating a cover-up) would be beneficial to Dufort's co-workers or advance some bargained for right is out right asinine because doing so would clearly undermine the Respondent's business operations where it is essential for employees to perform their job related duties in a hotel (i.e. change bedding, especially when directed by a supervisor) and not lie to management that they have done so when they have not.

As such, because Dufort's aforesaid conduct for which she was terminated was not "concerted activity" and, as such, is not provided the protection of the Act for the reasons previously set forth herein, thereby making her termination not in violation thereof.

b. Dufort was NOT Discharged for Engaging in Protected Concerted Activity

The General Counsel failed to establish that Dufort was discharged for engaging in protected concerted activities as so previously set forth herein. Further, the General Counsel only loosely asserted to the effect during the hearing that it was the Respondent's animus toward Dufort for previously filing grievances that was the motivation for her termination when the record clearly establishes that the termination was based solely on Dufort's aforesaid dishonesty made during the aforementioned non "concerted activity". (GC Exs. 1- The Complaint (Amended) ¶¶ 16-17; Ex. 4; Ex. 19, Ex. 20). Although it is the Respondent's position that the General Counsel failed to establish that the activity for which Dufort was terminated was "concerted", thereby obviating the need for any further analysis as to whether Dufort's termination violated the Act, in the event that the ALJ finds such analysis warranted Respondent contends that the "mixed motive" test adopted in Wright Line is appropriate under the circumstances.

Legal Authority

Where motive is at issue, Courts have employed the Board's *Wright Line* "mixed motive" test set forth by the Board in *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980). *enforced on other grounds*, 662 F.2d 899 (1st Cir.1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 397--404, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983), *abrogated by Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) in order to determine whether

an employee was discharge for engaging in protected concerted activities. Under this test, if the General Counsel makes a prima facie showing that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the 'same action would have taken place even in the absence of the protected conduct.'" *NLRB v. Alan Motor Lines Inc*., 937 F.2d 887, 889 (3d Cir. 1991) (quoting *Wright Line*, 251 N.L.R.B. at 1089); *accord D & D Distrib. Co. v. NLRB*, 801 F.2d 636, 642 (3d Cir. 1986) (citing *Transp. Mgmt. Corp*., 462 U.S. at 401-02). *Wright Line* is designed to preserve what has long been recognized as the employer's general freedom to discharge an employee " for a good reason, a poor reason, or no reason at all, so long as the terms of the [Act] are not violated." *See Meyers Indus*. (Meyers I), 268 N.L.R.B. 493, 497 n.23 (1984) (quoting *NLRB v. Condenser Corp. of America*, 128 F.2d 67, 75 (3d Cir. 1942)).

For the General Counsel to make a prima facie showing that the conduct was a motivating factor in the employer's decision it must be established by a preponderance of evidence that, 1) the employee engaged in protected union activity, 2) the Employer knew about this activity, 3) the Employer took an adverse employment action against the employee, and 4) there was a motivational nexus between the employee's protected activity and the adverse employment action. See *The Hays Corp*., 334 NLRB 48, 49 (2001).

Analysis of the Pertinent Facts
& Legal Argument Pertaining Thereto

Again, from the very nonspecific and generic allegations set forth in the Complaint in conjunction with the completely non-credible testimony of Dufort, it is unclear what exact protected activity the Charging Party has claimed that the Respondent, in retaliation for Dufort's participation therein, terminated her for. However, Respondent assumes, based on the sporadic testimony offered by Dufort, that the activity that the Charging Party alleges is specific to

Dufort's filed grievance against the Respondent in February of 2017 when Dufort, after coming into work when not scheduled to do so, filed a grievance for pay. Although that specific grievance had not been resolved (solely because of Dufort's refusal to accept the offer) the Respondent, by way of Wysocki, offered Dufort four (4) hours of pay when grievancing her complaint with Dufort and Mercedes to being owed pay, despite Dufort not having worked on the aforesaid day at issue. (Hr'g Tr. vol 3. 329:3-7, 333:7-10, June 20, 2018). Even assuming that the General counsel is able to establish the aforementioned elements necessary for a prima facie case, the central issue becomes whether the Respondent would have terminated Dufort even in the absence of the protected conduct, in this case the aforesaid February 2017 grievance and/or her complaints to Stern subsequent to having acknowledged that she received the aforementioned March 15th and March 16th write ups, the latter of which specifically stated in bold letters therein that "**Please be advised that this notice could change into a dismissal notice based on further investigation of your insubordination and dishonesty, according to Article XI in the Agreement between the Union and Hotel**". (GC Ex. 19) *NLRB v. Alan Motor Lines Inc*., 937 F.2d 887, 889 (3d Cir. 1991) (quoting *Wright Line*, 251 N.L.R.B. at 1089).

Respondent's Assistant General Manager, Vanessa Rubio ("Vanessa"), testified credibly that based upon her twelve (12) years of employment, part of which encompassed being a supervisor within the housekeeping department, that she knew of only one other employee in the hotel who engaged in dishonesty rising to the level that which Dufort was terminated for. Specifically, the aforesaid employee in question, Beatrice Gonzales ("Gonzales"), was terminated when she failed to report a lost garment of a guest that she found in laundry where she worked and decided to keep it for her self, lying about if she had come across that garment in the laundry room when management conducted a similar investigation as they had concerning

Dufort.[4] (Hr'g. Tr. vol. 4, 548:5-549:19 June 21, 2018). Similarly, Dufort was terminated for dishonesty on March 16th that was akin to that of Gonzales's when she tried to cover up her own prior bad conduct, when, and in direct violation of her supervisor's direction "flipped" the bedspread instead of changing it the day before as instructed. A review of the aforesaid discipline write ups and the April 4th Termination Notice in conjunction with Dufort's completely hostile and sconflicting testimony demonstrates that that it was not the act of insubordination that she was terminated for (although that could have justified immediate dismissal pursuant to Article XI of the CBA by itself), but the extent to which she lied and tried to cover it up. (GC Exs. 19, 20) (Hr'g. Tr. vo3. 278-351 June 20, 2018). Dufort, even after almost a year and half to get her story straight, deviated from what she proffered to Sayde in March of 2017 in preparation of her defense offered to the Respondent at the April of 2017 grievance (that she flipped the bedspread in accordance with the housekeeping practice of the entire department), lying yet once again when she testified at the hearing on June 20, 2018 that she changed the bedspread both times Jessica directed her to do so, offering nonsensical answers that "all the comforters are stained" when it was inquired of her how the same stain was apparent on the comforter (in the exact same

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Q. Do you recall what Beatrice Gonzales was terminated for?
A. For a blouse…
A. She used to work in the laundry. And a guest had reported a blouse missing, well, that she left in her room. We had reported it to housekeeping to ask anyone if they had seen it or if it came into -- when they bring down the clothes, it was probably in there. Maybe somebody saw it from the laundry department.
… no one didn't report anything
….she had it in her locker, the shirt.
Q. Did she have it in her possession?
A. She had it. She had it, yes.
Q. What was she ultimately terminated for?
A. For **dishonesty**.
(H'rg. Tr. vol. 4, 548:18-20; 548:22-549:2, 6-8, 18-19 June, 21 2018)

location) on the afternoon of March 15th after she was instructed to change the bedspread and was later found on the bed (in the exact same location) on March 16th after the supervisors re-flipped the bedspread when investigating how the stain on the morning thereof was no longer present after it was the day before subsequent to Dufort punching out. (Hr'g. Tr. vol 3. 336:1-337:17 June 20, 2018).

Further, the absence of evidence, specifically that no other housekeeping attendant had been terminated before for same infraction as Dufort (lying to a supervisor), is not evidence of itself that Dufort was treated any differently. Gonzales was terminated for dishonesty, specifically lying to management during an investigation for the missing blouse, which she had seen at the time of inquiry, but denied so she could keep it for herself. Respondent, even in the absence of the protected conduct that is claimed by Dufort to be the motivation for her termination, clearly would have terminated her just as it had with Gonzales prior to Dufort's termination taking place. *NLRB v. Alan Motor Lines Inc*., 937 F.2d 887, 889 (3d Cir. 1991) (quoting *Wright Line*, 251 N.L.R.B. at 1089); *accord D & D Distrib. Co. v. NLRB*, 801 F.2d 636, 642 (3d Cir. 1986) (citing *Transp. Mgmt. Corp*., 462 U.S. at 401-02); *Cellco Partnership v. NLRB*, No. 17-1158, p. 12, 14-15 (D.C. Cir. 2018) (holding that a union supervisor lies to management during an investigation and termination thereof "was a legitimate business judgment – a not unusual one – [because] an employee lying during an investigation is a serious threat to management of the enterprise." Further finding that the charged party applied the policy to terminate dishonest employees consistently and would have done so regardless of the protected activity that the employee alleged was the motivation for her termination).

Thus, Respondent's termination was permitted and not in violation of Sec. 8(a)(3) of the Act because Respondent applied the policy for terminating employees for dishonesty evenly,

doing so regardless of Dufort's engagement in the alleged protected activity as so previously set forth herein and, like the employer in Cellco Partnership v. NLRB, the Respondent had a legitimate business interest and judgment in terminating an employee who lied during an investigation, especially where the lies at bar were over the essential and vital functions to Respondent's business (i.e. having clean rooms for booking) and, if left unchecked, would clearly be a detriment to the Respondent's ability to exert authority over its essential business operations from which it derives most of its revenue from (i.e. the booking of its clean rooms)

B. The Respondent Did NOT Fail to Provide the Union With the Requested Records Because The Respondent Notified the Union that It Had Elected To Exercise Its Rights To Grieve Any Such Issue Complained of By An Employee With The Relevant Representative Of the Union Present In Accordance with the CBA.

Respondent contends that the allegation set forth in paragraphs 18-20 of the Complaint as Amended are moot because, at the hearing on May 30, 2018 the Respondent and the Union entered into a stipulation where the Respondent agreed to produce the agreed upon and pertinent documentation requested and as alleged in the Complaint as previously set forth herein. In full satisfaction thereof Respondent, on or about June 21, 2018 (during the fourth hearing date), did comply with the terms of the aforesaid stipulation rendering such aforesaid allegations no longer in issue.

C. The Respondent did NOT Violate Sec. 8(a)(1) of the Act When Distributing Its September 8, 2017 Letter Because The Letter Was Not That Which Constituted Direct Dealing As Where It Sought Solely To Apprise The Employees of The Status in Negotiations Over Wages And The Change In Health Care Coverage That the Respondent Was Permitted To Implement In Accordance with Section 3 Of the February 2012 Side Agreement.

Legal Authority

Direct dealing is identifiable in two ways: the employer's communications themselves can provide a basis for finding an unfair labor practice; additionally, the challenged

communications can be viewed within a pattern of other unfair labor practices which, when examined in its totality, reveal direct dealing in violation of Sec. 8(a)(5). NLRB v. *Prat & Whitney Air Craft Division* 789 F.2d 121 (2d Cir. 1986), citing *Adolph Coors Co*., 235 NLRB at 277. The predominant factor that is considered when evaluating whether the employer engaged in direct dealing by way of written memorandum or notices to employees is whether such conduct undermines or excludes the Union from the discussion for the purpose of establishing or changing wages, hours, and terms and condition of establishing or changing…hours and terms of employment. *Permanente Medical Group*. 332 NLRB 11143 (2000).

Analysis of the Pertinent Facts
& Legal Argument Pertaining Thereto

At bar the conduct of the Respondent, by way of its September 7, 2017, must be examined in its totality of the circumstances for which it was made under. Wysocki, admittedly frustrated by the Union's actions to obstruct the Hotel's unilateral right implement equal to and/or better than coverage as set forth in further detail herein pursuant to Sec. 3 of the Side Agreement, drafted the September 2017 Letter, admittedly with English not as his primary language, with the intention to merely inform the employees as to the offers in wage increases that were rejected by the Union, notify the employees of the benefits of the Qual Care insurance coverage offered by the Employer and the implications if the plan was not adopted, and the economic hardships that the Respondent would likely experience if it was to enter the GRIWA contract as the Union so demanded. All of the aforesaid topics were matters previously discussed and negotiated with the Union at length ultimately culminating in an impasse after the Union rejected the most recent wage proposal by the Respondent to obtain the Union's recommendation to the employees to enroll in the Qual Care Plan. (Hr'g. Tr. vol 5, 600-608; 653:22-666:20). As such, the letter cannot be considered to be in violation of Sec. 8(a)(1) for

direct dealing because the Union cannot claim to have been excluded from the topics presented therein where the Union had been previously apprised of and consulted with respect to all of the aforesaid matters prior to the issuance of the September 2017 Letter, having negotiated them extensively with the Respondent, with the final results from those negotiations represented and so communicated in the September 2017 Letter. Further, the representations made therein with respect to the wage increases that were offered by the Respondent and rejected by the Union were factually accurate and not contradicted by any of the testimony elicited by the General Counsel with respect thereto. The employer conveying the negatives as to the Union's failure and/or refusal to come to terms on the insurance, wage increases, and GRIWA were in the Respondent's right to make as so afforded pursuant to Sec. 8(c) of the Act because the September 2017 Letter was absent any threat of reprisal or force or promise of benefit where the testimony provided by Wysocki further clarified that each topic expressed therein was portrayed in a cause and effect scenario for the employees to be apprised of.

For the reasons previously set forth herein the Respondent did not violate Sec. 8(a)(1) when disseminating is September 2017 Letter.

D. The Respondent did NOT Violate Sec. 8(a)(1) of the Act Because It did Not Threaten To Take Away The Health Insurance As Set Forth In The September 2017 Letter Where The Statements Made Therein That Pertained Thereto Purely Were Informative And Outlined The Manner By Which The Union Had Obstructed The Implementation of The Qual Care Plan, Constituting Free Speech And The Right To Communicate Its Views To The Employees.

Legal Authority

"The prohibition set forth in § 8(a)(1) is limited by [the protection granted by] § 8(c)." *J.P. Stevens & Co. v. NLRB,* 638 F.2d 676, 684 (4th Cir. 1980). Section 8(c) provides that:

> [t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of

> an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c).

Analysis of the Pertinent Facts
& Legal Argument Pertaining Thereto

As set forth in further detail in Sec. C above, the Respondent's letter simply conveyed the truth as to what could occur if the Employees did not sign up for the Qual Care plan. It was not a threat, but the Respondent's opinion as to the likely scenario that the Respondent believed could unfold based upon the negotiations with the Union that had taken place just days before. Though the conveyed opinion of the Respondent could be an unpleasant possibility to digest it was merely how the Respondent believed the effect could be on the employees if the Qual Care plan was not enrolled in.

For the reasons previously set forth herein and in Section C above the Respondent did not threaten the employees by way of its September 2017 Letter, but merely conveyed its opinion as to what could occur under the circumstances presented therein and discussed with the Union in detail the exact same scenario during the two weeks before the aforesaid letter was distributed, the action of which is not a violation of Sec. 8(a)(1) because of the Sec. 8(c) protection afforded to the Respondent.

E. The Respondent Did NOT Violate Sec. 8(a)(5) of the Act When He Refused To Permit George Padilla To Remain In The Hotel Because The Respondent Was Permitted to Do So Where Respondent Had Bargained For The Right To Not Have George Padilla In The Hotel Pursuant to a Duly Negotiated Settlement Agreement Entered Into Between the Union and The Respondent on Jan. 27th Settlement Agreement That Was Approved By The Region

Legal Authority

Pursuant to Section 8(a)(5) of the Act it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." "Each party to the

collective bargaining process has a right to choose its representative, and there is a correlative duty on the opposite party to negotiate with the appointed agent." *NLRB v. ILGWU, et. al* 374 F.2d 376 (3d Cir. 1960). However, this rule is not absolute or immutable. *Id* at 379. citing *NLRB v. Kentucky Utilities Co*., 182 F.2d 810, 813 (6 Cir. 1950) (holding "*that it was not an unfair labor practice for an employer to refuse to negotiate with a union representative who had evidenced hostility to it by his past activities* [where] [w]*ith Braswell acting as one of the negotiators for the Union, any meeting with the negotiators would not have fulfilled the requirements of collective bargaining* [because] [h]*is expressed hostility to the respondent and his purpose to destroy the respondent financially made any attempt at good faith collective bargaining a futility*"). Thus, an exception to the general rule arises when the situation is so infected with ill will, usually personal, or conflict of interest as to make good-faith bargaining impractical. *NLRB v. ILGWU*, 274 F.2d at 379.

Collective bargaining agreements…are to be interpreted according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. M *& G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) citing *Textile Workers v. Lincoln Mills of Ala*., 353 U.S. 448, 456–457 (1957). The "rule that 'contractual provisions ordinarily should be enforced as written is especially appropriate…" M *& G Polymers USA, LLC*. at 933 (2015) , citing *Heimeshoff v. Hartford Life & Acc. Ins. Co*., 134 S. Ct. 604, 611–612 (2013). "'Where the words of the contract are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.'" *Id*. at 933, citing 11 R. Lord, Williston on Contracts § 30:6, p. 108 (4th ed. 2012)(Williston) (internal quotation marks omitted). The concurrence in Tackett added when the contract is ambiguous, a court may consider extrinsic

evidence to determine the intentions of the parties." *Id*. at 938, citing Williston § 30:7, at 116–124.

Analysis of the Pertinent Facts
& Legal Argument Pertaining Thereto

On January 27, 2018 the Union and the Respondent entered into a duly executed settlement agreement (the "January Settlement Agreement") that resolved a number of charges. (GC. Ex. 12). One of those charges alleged by the Union was that the Respondent violated Sec. 8(a)(5) of the Act when the Respondent, by way of a letter dated August 3, 2016, notified the President of the Union, Peter Ward, that George Padilla (presently a vice-president, but at the time of the aforesaid notice an Organizer of the Union) would no longer be permitted in the Hotel in light of the fight that occurred between Padilla and an employee during a meeting between Padilla, union employees, and management, which took place at the Hotel. (Hr'g. Tr. vol. 5 576:1-583:19) June 22, 2018).The aforesaid altercation disrupted the business of the Respondent requiring that Padilla be escorted out of the Hotel. *Id*. The Respondent's Assistant Operations Manager, Desiree Ruiz ("Ruiz"), described the altercation as "what you would see, like, at a bar [with two men about to fight]" and, believing that it was getting out of hand, "suggested to [Wysocki] to call the cops because…she felt her work environment was unsafe at that point". *Id* at 581:18-24; 583:21-584:5. In response to Desire's concerns and from his own observations of the aforesaid incident Wysocki, who had been present during the aforesaid altercation, determined that Padilla posed an unnecessary risk to the safety and welfare of not only the management personnel who were present at the time, but more importantly, the employees who he represented and had the altercation with. *Id* at 671:18-671:1. Of particular note is that no other Union representative was ever barred and/or asked to leave the Hotel at this time or afterwards except for Padilla.

Further, Respondent's management team routinely had issues with Padilla's overall attitude and demeanor, being far from professional and out right inappropriate, such as when Ruiz met Padilla for the first time. Ruiz, in summary, described her initial interaction with Padilla during a safety inspection to "make her uncomfortable" when he refused to stop taking pictures of her when she requested and, in response thereto, conveyed to her that "he had a right to take pictures of anything with regards to employee safety [and] that being that [Desiree] represents the Hotel [she] could be included in them". (Hr'g. Tr. vol. 5 571:4-25 June 22, 2018). Ruiz was so disturbed by her first interaction with Padilla that, upon the advice of the management team leader at that time, Anthony Lapago, wrote an email documenting the interaction to the President of the Hotel. (R. Ex. 4). Further, Ruiz recalls that Padilla, during the same inspection, was "being really nasty…with Ramon [a maintenance engineer] [who she describes] is not confrontational at all". However, Padilla, in response to Ramon's requests that Padilla provide him with specifics as to what Padilla had issues with in the boiler room during the aforesaid inspection so that Ramon could properly address them, "became very condescending" (Hr'g. Tr. vol. 5 572:13-20 June 22, 2018). Adding insult to injury Padilla routinely called Ruiz "after hours on her personal cell phone", which to date, she cannot explain how he got her number as she never gave it to him, despite being available between 9a.m.-5p.m. on weekdays to discuss the purported grievance issues that he claimed were his reason for calling her during the evening. (Hr'g. Tr. vol. 5, 573:20-24; 574:4-12 June 22, 2018). Further, Rubio's testimony corroborates that of Ruiz and Wysocki's with respect the aforesaid altercation between Padilla and the employee as well as Padilla's condescending attitude and hostile demeanor, describing him as "he wasn't really the most-greatest time" Hr'g. Tr. vol. 4, 540:19 June 21, 2018)

To resolve the aforesaid charge and issues with Padilla being bared from being on the Hotel property as set forth in Wysocki's August 2, 2016 letter to Peter Ward, the Respondent and the Union agreed that, pursuant to the January Settlement Agreement, "The Employer will not bar any Union representatives from the Hotel nor interfere with their access pursuant to the expired CB." However, as a condition precedent to Padilla being permitted back on Hotel property the Parties agreed that "Prior to Mr. Padilla returning to the Hotel, the parties shall meet, provided such meeting must take place before February 15, 2017." (GC Ex. 12). The Union abided by the terms of the January Settlement Agreement, specifically where Padilla, since August of 2016 (the date when he was barred for engaging in the altercation with an employee) refrained from being on Hotel property, yet never scheduled the meeting with Wysocki to take place as required by February 15, 2017. Unfortunately, Padilla, more than a year having not been at the Hotel, on August 23, 2017 and without notice to the management as required pursuant to the CBA and in violation of the January Settlement Agreement, showed up unexpectedly at the Hotel. (GC Exs. 2). Specifically, Padilla barged into Wysocki's workroom without warning. Wysocki demanded that he leave as he was in violation of the January Settlement Agreement as neither he nor Wysocki had met prior to February 15, 2017 to "clear the air" as required by the Settlement Agreement as a condition precedent for Padilla to be permitted back on Hotel Property. (Hr'g. Tr. vol. 5 700:3-702:2 June 22, 2018) Thereafter Wysocki, by way of a letter dated August 24, 2017 reminded the Union that Mr. Padilla breached the January Settlement Agreement and continued to pose a risk to the safety and welfare of the guests and employees of the Hotel as no resolution had taken place between he and Wysocki by the aforesaid February 15, 2017 deadline. (GC Ex. 31).

The Respondent did not commit an unfair labor practice with respect to Sec. 8(a)(5) of the Act when directing to Padilla to leave the Hotel property after he showed up unannounced and, in line with his *modus operadi*, quite hostile, on August 23, 2017 because Padilla had continuously evidenced hostility prior thereto as so previously set forth herein when he was unnecessarily condescending and hostile to management and out right physically violent (to his own constituent) in the presence of. Padilla's aforementioned conduct unfortunately, for him, was the impetuous that lead to the "situation with [the Respondent] to become so infected with ill will [and] personal by nature that made good-faith bargaining [with him] impractical. *NLRB v. ILGWU,* 274 F.2d 376 (3d Cir. 1960). citing *Kentucky Utilities Co*., 182 F.2d 810, 813 (6 Cir. 1950). Further, and as corroborated by Ruiz, Rubio, and Wysocki's respective testimony, they found no other issues with any of the other Union representatives, such as Sayde or Gideon, that rendered bargaining in good faith with those representative impractical. More importantly, Wysocki when demanding that Padilla vacate the Hotel's premises on August 23, 2017 and reaffirming the ban on Padilla being in the Hotel for the reasons set forth in his August 24, 2017 letter, was acting under the authority of the duly negotiated and bargained for terms that permitted him to do so as set forth in the January Settlement Agreement.

The January Settlement Agreement's terms should be enforced as written because the Parties bargained for the benefit thereof in accordance with Sec. 8(a)(5) of the Act, specifically where in consideration of the terms set forth therein Padilla was under an affirmative obligation to meet Wysocki and clear the air prior to February 15, 2017 as condition precedent to Padilla being permitted back on Hotel property. Because this did not occur, nor has occurred as of date, the aforesaid provision is still enforceable pursuant to the plan meaning and construction thereof. M *& G Polymers USA, LLC*. at 933 (2015) , citing *Heimeshoff v. Hartford Life & Acc. Ins. Co*.,

134 S. Ct. 604, 611–612 (2013). Further, the record is devoid any testimony offered to demonstrate that Padilla attempted to meet with Wysocki by the aforesaid February date, but that Wysocki was otherwise unavailable. To the contrary, Wysocki met with Union representatives at the April 2017 grievance concerning Dufort and again during multiple days of in person negotiations at the Union's principal office, neither of which were the face to face meeting required pursuant to the January Settlement Agreement to occur first before Padilla was permitted to return to the Hotel. Although Assistant General Counsel to the Union, Amy Bokerman's testimony, subsequent testifying to the contrary the day before, attempted to proffer that Padilla had come to the Hotel prior to August 23, 2017, purportedly having a "shop visit" on August 9th according to his date book, which was not offered into evidence and, based upon the statement of the declarant (Bokerman) being derived from a conversation that she had with Padilla's assistant, complete hearsay testimony which should be stricken from the record. (Hr'g. Tr. vol. 5 562:2-24 June 22, 2018). Further, Padilla was present during the heard on June 20th and 21st, yet was not called as a witness by the General Counsel to confirm and corroborate the very charge that directly pertains and is based upon his conduct. Regardless, even if Padilla did actually have a "shop visit" as Bokerman testified his date book had written in it as so communicated to her by his assistant, the very representation set forth in his date book is not conclusive evidence that he actually met with anyone at the Hotel or was present therein on August 9th as no corroborating evidence was offered in support of the aforesaid hearsay testimony. Even assuming Padilla was present at the Hotel on August 9th both Wysocki, Ruiz, and Rubio, all senior management, had no knowledge of his presence and testified to the effect that they were always informed when ever Padilla was at the Hotel, thereby not making his alleged presence on August 9th to be considered a waiver of the bargained for January Settlement

Agreement rights as no such actual knowledge thereof can be imputed as so previously set forth herein. Conversely, it is the Union who waived the right to demand that Padilla be the Union's bargaining representative for the Hotel after it for more than a year after the Respondent barred Padilla from the Hotel on August 2, 2016 as so previously set forth herein had every other representative thereof perform Union related duties at the Hotel other than Padilla, the action of which either was in accordance and acceptance with the agreed upon terms of the January Settlement Agreement or constituted an amended pattern and practice by the Union, which the Respondent justifiably relied on pursuant to the ordinary principals of contract law that govern collective bargaining agreements. M *& G Polymers USA, LLC*. at 933 (2015); *Heimeshoff*, 134 S. Ct. 604, 611–612 (2013).

For the reasons previously set forth herein the Respondent did not violate Sec. 8(a)(5) when it enforced its rights pursuant to the January Settlement Agreement by directing Padilla to leave the Hotel confirming the same by way of the aforementioned August 24, 2017 letter to the Union.

F. Respondent did NOT UNILATERALLY Fail to Maintain The Unite Here Health Fund ("UHH") Insurance Coverage In Violation of Sec. 8(a)(5) of the Act Because The Union Breached of the CBA and Obstructed the Respondent's From Exercising Its Bargained For Right Set Forth Therein That Permitted The Respondent to Unilaterally Implement Alternate Coverage That Was Equal To Or Better Than the Coverage Provided By UHH

Legal Authority

Under the Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Employers and the employees' representatives have a mutual obligation to bargain collectively over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). Subjects that fall within the statutory category of "wages, hours, and other terms and conditions of employment"

are commonly referred to as "mandatory bargaining subjects." *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 176, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971) (inquiring *whether pensioners' benefits were "a mandatory subject of collective bargaining as 'terms and conditions of employment' of the active employees who remain in the unit*"); *NLRB v. Columbus Printing Pressmen & Assistants' Union* No. 252, 543 F.2d 1161, 1164 (5th Cir.1976). The United States Supreme Court has noted that, "[i]n general terms, the [category of mandatory bargaining subjects] includes only issues that settle an aspect of the relationship between the employer and employees." *Allied Chemical*, 404 U.S. at 178, 92 S.Ct. 383. This general statement in turn highlights one last feature of a mandatory bargaining subject: It must affect "employees." "The duty to bargain under the [Act] does not prevent parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment. *B.P. Amoco Corp. v. NLRB*, 217 F.3d 869, 872-73 (D.C.Cir.2000) (quoting *NLRB v. United States Postal Service*, 8 F.3d 832, 836 (D.C.Cir.1993)). In addition, a party may, by means of a "clear and unmistakable" waiver, relinquish its statutory right to bargain. *Mississippi Power Company v. National Labor Relations Board* No. 00-60794 (5th Cir. 2002), holding that "*the Union The right to bargain over the "matter of insurance" was the right explicitly relinquished by the Unions when they signed the Insurance Side Letter in exchange for a guaranteed level of premium contributions from the Company for as long as the MOA and Company-sponsored group medical insurance continued in existence*" citing *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir.1963).

Analysis of the Pertinent Facts
& Legal Argument Pertaining Thereto

Pursuant to the complete copy of the CBA submitted into evidence by the Respondent the Parties entered into an agreement on February 12, 2012 that, based on the terms set forth therein

and the date & time stamp of the fax exchange between the parties thereon made the CBA conditioned upon the execution of the aforementioned agreement, specifically referred to by Bokerman as a "Side Letter" Agreement. (R. Ex. 2). Of particular note is Sec. 3 of the Side Letter, which sets forth that "Should the Hotel find a more affordable health care alternative, the parties agree that the hotel may change providers, provided such alternative maintains the same if not better level of current benefits, eligibility threshold, and coverage without employee contributions" *Id*. In accordance with the aforesaid bargained for right as set forth previously herein, the Respondent attempted not once, but twice to exercise its unilateral right to implement "equal to or better than coverage" when it first sought to implement a more affordable, but equal coverage, to its employees administered by Health Republic (in 2015/2016) and then again attempting to do so using Qual Care in August of 2017. Unfortunately, the Union, despite having waived its right to bargain over the implementation of such health care coverage as set forth in the Side Letter, obstructed the Respondent's implementation of the Health Republic insurance when it refused to provided the Union specific pedigree information needed of the employees that was necessary for the enrollment (i.e. employee spouse names, social security numbers, etc.). In fact, the Respondent was left with no other recourse to obtain the aforesaid pedigree information from the Union by to filing a charge to the NLRB for an unfair labor practice, which was withdrawn by the Respondent after the Union authorized the Respondent to seek the aforesaid pedigree information directly from the members. Unfortunately, so much time had elapsed since the quotes for premiums were provided by Health Republic that when the Respondent pursued implementing coverage thereby the rates had increased to that which no longer made it economical viable for the Respondent to implement in accordance with its right to

do so pursuant to Sec. 3 of the Side Agreement. (Hr'g. Tr. vol 5, 588-595; 643:21-649:10, June 22, 2018).

Now being in possession of the requisite pedigree information needed for a plan provider to process the applications for enrolment the Respondent restarted the lengthy and time consuming process to locate a provider who could provide coverage as set forth in Sec. 3 of the Side Letter and do so at a more affordable rate than UHH. Pursuant to the Side Letter and the CBA , in conjunction with the testimony offered by Ruiz and Wysocki, it is readily evident that the Respondent, at the time the Side Letter and CBA were executed, was very concerned at the unknown amounts that the UHH's plan would increase by each year as so evident by conditions set forth in the Side Letter that permit the Respondent to no longer be obligated to pay the employee wage increase in a given year if "the UHH premium increases by more than 20%." *Id*. (R. Ex. 2 – Sec. 2 of the Side Letter). In August of 2017 Respondent confirmed with Qual Care that its plan and services afforded thereunder were not just equal to the coverage provided by UHH, but actually better than where there was a savings to the employee of more than $1,000 per year in deductibles and co-pays that were more favorable under the Qual Care plan when compared to that of the then current UHH plan. Time being of the essence as it was essential that the Respondent have the employees sign up for coverage by September 1, 2017 to ensure that coverage would commence the Respondent's representative met with the Union at its principal office in New York City and answered questions pertaining to coverage and provided the Union with a summary of benefits for review so as to make it more likely that the Union would recommend to members who were employed by the Respondent to sign up for coverage. Unfortunately, the Union elected to use this as an opportunity to extract wage increases, ultimately demanding that all the savings that the Respondent anticipated in benefiting its

operation be passed along in the form of wage increases, which clearly frustrated that which the Respondent hoped to achieve, which was to reduce its overhead as there was more competition for booking because more Hotels in the area were in operation since July of 2011 when the CBA was first entered into and assigned thereafter in 2012 to the current Union. *Id*. at 644:25-645:18; 651:9-654:21. Despite the Respondent's efforts to provide the Union with as much information as possible, short of the exact figure of the monetary savings it expected to receive pursuant to the Qual Care quote, and the informational meetings the Qual Care provider representatives attempted to have with the employees, the Union refused to recommend that the employees sign up for the Qual Care insurance plan solely to extract or perhaps more appropriately, extort wage increases that were above what were previously offered by the Union six months earlier and bend its will to force the Respondent to adopt the GRIWA universal collective bargaining agreement as a successor to the CBA that had been expired at the time for close to three years. *Id.* at 656:12-658:6. As a result of the Union's conduct the Respondent was prevented from implementing the Qual Care plan for September 2017 coverage to begin and was only able to do so in June of 2018 after obtaining updated household information from the employees which, once completed, enabled the Respondent to sign the members up directly because the Respondent was continuing to pay 100% of the premiums and where there was no longer the impediment of Qual Care requiring the individual employees authorization to switch coverage from UHH to Qual Care as UHH had elected to cancel the coverage, thereby making any authorization to change coverage unnecessary. *Id*. at 668:2-663:5.

Similar to the waiver in Mississippi Power Company executed by the union, the Union waived its right to bargain over the insurance coverage pursuant to Sec. 3 of the Side Agreement in consideration that the Respondent pay 100% of the premiums on behalf of the employees. (R.

Ex. 2) *Mississippi Power Company v. National Labor Relations Board No. 00-60794* (5th Cir. 2002), holding that "the Union The right to bargain over the "matter of insurance" was the right explicitly relinquished by the Unions when they signed the Insurance Side Letter in exchange for a guaranteed level of premium contributions from the Company for as long as the MOA and Company-sponsored group medical insurance continued in existence". Unfortunately for the Respondent, its was the conduct of the Union, in violation of Sec. 3 of the Side Agreement, that usurped the unilateral right of the Respondent to implement coverage where the Union first refused to permit the Respondent to directly seek requisite pedigree information from the employees when desiring to implement the Health Republic plan, thereby leading to delays that made that plans implementation no longer viable as so previously set forth herein; only then to refuse to recommend the Qual Care coverage to the employees, aware of the fact that because the employees were currently enrolled in UHH and would have to provide their respective consents to terminate their own individual enrollment in UHH in order to elect alternate coverage by way of Qual Care, using such as an obstacle (in violation of the aforesaid waiver) to prevent the Respondent from exercising its rights afforded under the CBA and Side Agreement.

Further, the Respondent acted in accordance with the past practices when being apprised of cancelation notices made by UHH as it was the regular practice at least two separate times before for UHH to re-implement coverage shortly after canceling. In fact, UHH did just this as memorialized in the January Settlement Agreement. (GC Ex. 12). However, subsequent to UHH's September 2017 notice of cancelation the Respondent was unaware that UHH had terminated coverage effective November 1, 2018 until such time that Wysocki appeared before the ALJ on the first day of the hearing. (Hr'g Tr. vol. 1 May 30, 2018).

For the reasons set forth previously herein Respondent did not violate Sec. 8(a)(5) because Respondent, relying on the past practices of UHH continuing coverage subsequent to rendering notices of cancelation, was unaware that UHH had terminated coverage because they, always pursued payment for months owed by reinstating coverage within weeks after terminating it. Further, the Union's aforesaid conduct that obstructed the Respondent's unilateral right to implement coverage as so previously set forth herein was, its self in violation of Sec. 8(a)(5) of the Act and a superseding proximate cause of UHH's termination of coverage.

G. The Respondent did NOT Fail to and/or Refuse to Meet and Bargain With The Union In Violation Sec. 8(a)(5) of The Act Because The Respondent Did Engage In Bargaining Activity "Away From The Table" Where, In Response To Its Action To Enforce Its Rights Pursuant To the CBA Filed In The Federal District Court of New Jersey, Both The Union and Respondent Engaged In Negotiations Not Only To Resolve That Action, But Those Which Were In Kind To A Global Resolution Over All Matters Previously Discussed At the In Person Bargaining Session That Occurred In August and September via Teleconference.

Legal Authority

Pursuant to Section 8(d) of the Act an employer and the collective bargaining representative of the employees are required to meet at reasonable times to negotiate matters in good faith. Pursuant FRCP §§ 401 & 402 all evidence is admissible if it is relevant and is not otherwise barred by statute.

Analysis of the Pertinent Facts
& Legal Argument Pertaining Thereto

It is respectfully submitted by the Respondent that the ALJ erred when denying the admission of R. Ex. 5 at the objection by the Union when the Respondent had laid a proper foundation for its admission as a business record kept in the ordinary course of business, for the purposes of demonstrating that the Union and the Respondent did, negotiate matters that directly

pertained to and encompassed resuming again in March of 2018 approximately six (6) months subsequent to the last "away from table" bargaining session' that occurred in October of 2017. The emails assembled as R. Ex. 5 demonstrated that, although the Parties initially pursued such negotiations under the guise of being exclusive for settlement purposes with respect to aforesaid Federal District Court Case commenced by the Respondent, the intentions of Wysocki changed per the Judge's direction at the March 2018 preliminary conference, specifically where the Judge encourage that the Parties to seek a global resolution with respect to the issues arising from the previous collective bargaining negotiations. (Hr'g. Tr. vol 5, 707:25-709:4 June 22, 2018). Furthermore, the fact that the General Counsel used GC Ex. 38 to demonstrate the Parties intention to have such negotiations remain exclusive for settlement purposes concerning the District Court Action, makes R. Ex. 5 all the more relevant as why it should have been admitted because it was relevant to establish the conduct of the Parties in its totality and not just an isolated email in the form of GC Ex. 38 which was but one of more than twenty (20) emails submitted for admission into evidence by way of R. Ex. 5. Furthermore, counsel for the Respondent could not represent with certainty that the emails proffered in R. Ex. 5 were a complete set of such communication by and between the Parties during that period of time they represented to be because Respondent's attorney, based upon the date of his retainer and client obligations during the period of the two adjournment that was granted, had six (6) actual days to allocate to the preparation of the hearing and, as such, could only represent that R. Ex. 5 were representative and complete of the emails that the Respondent provided to counsel as it was impossible to do a thorough document search under the time constraints and prepare for the three to four days of hearing testimony in conjunction therewith.

As such, it is respectfully requested that the ALJ reconsider the admission of R. Ex. 5, and, in accordance with FRCP 401 & 402 admit R. Ex. 5 as it is relevant and establishes that the Parties did engage in bargaining within six months of the last date in the Fall of 2017, which, based upon the period of time in-between the aforesaid October 2017 date does not exceed that which would otherwise be considered to be a departure from when the Parties would otherwise be reasonably available to meet within to bargain in good faith pursuant to 8(a)(5). As such, should the ALJ admit R. Ex. 5, it is the position of the Respondent that no violation of Sec. 8(a)(5) occurred because the Respondent did not fail to meet at reasonable times according Sec. 8(d) of the Act where the Parties, approximately within six (6) months after the last meeting resumed negotiations, meeting face to face in a jury room in the Federal District Court House in Newark, NJ to not only discuss the parameters for resolution of the cause(s) of action in the aforesaid Federal Action, but a global settlement with respect to negotiating and adopting a successor agreement to the more than three (3) year expired CBA, and the resolution of the charges before the NLRB (Hr'g. Tr. vol 5 . 674-675).

IV. CONCLUSION

The record lacks credible testimony and evidence in support of the Charging Party's allegations set forth in the Amended Complaint. Further, and in conjunction with the applicable law, the conflicting testimony of Dufort and Mercedes, along with credible and consistent testimony made by Ruiz, Rubio, and Wysocki that rebuts that which was proffered by Bokerman is not which that provides support to establish that the Respondent violated Sections 8(a)(1), (3), & (5) of the Act as alleged in the Complaint. The Respondent, by way of its attorney, respectfully requests that You Honor find for the Respondent and dismiss the charges in their entirety.

Dated: New York, New York
November 8, 2018

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CERTIFICATION

This is to certify that copies of the Respondent's Post-Hearing Brief to Administrative Law Judge Lauren Esposito have been duly served via electronic filing on Judge Esposito on November 9, 2018 and on Respondent's Counsel and the Charging Party via email on the same date as follows:

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